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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – PSD Major Modification to Add New Unit 3 at Intermountain Power Generating Station, Millard County, Utah Project Code: N0327-010 DAQE-AN0327010-04	:	MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND REQUEST FOR AGENCY ACTION

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND REQUEST FOR AGENCY ACTION

The Utah Chapter of the Sierra Club ("Sierra Club") respectfully submits this memorandum in support of its motion to amend its First Amended Request For Agency Action. In conjunction with its motion, Sierra Club submits to the Air Quality Board ("Board") its Second Amended Request For Agency Action.

The Second Amended Request For Agency Action amends the Sierra Club's First Amended Request For Agency Action by dropping references to the Grand Canyon Trust, which has now withdrawn from this matter, and corrects the errata in Statement of Reasons # 20 which were described in Sierra Club's submission on January 3, 2007.

In addition, the Second Amended Request for Agency Action adds an additional claim, which appears as Statement of Reasons # 22. After review of the administrative record, which was produced by the Division of Air Quality ("DAQ") on February 6,

2007, and of which the parties obtained copies on February 15, 2006, it became apparent that the Approval Order ("AO") issued for Unit 3 has expired by operation of federal and state regulations when 18 months had passed without commencement of construction. For this reason, and as described in Statement of Reasons # 22 in the Second Amended Request for Agency Action, the Board must declare the AO invalid.

In court, Utah Rule of Civil Procedure 15(a) applies to motions to amend pleadings. In this matter, the DAQ has already responded to Sierra Club's First Amended Request for Agency Action. In these circumstances, Rule 15(a) states that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[1] Based on this rule, Sierra Club seeks the Board's permission to amend its request for agency action.

The Utah Supreme Court has "consistently encouraged liberal treatment of motions to amend a pleading as long as justice is furthered, and not hindered, by the amendment, so as to allow examination into and settlement of all issues bearing upon the controversy, [while] safeguard[ing] the rights of the other party to have a reasonable time to meet a new issue."[2] Allowing amendment of a complaint – or, in this matter, the request for agency action – is particularly appropriate where the amendment is presented well before trial, and the defending parties have ample opportunity to meet the newly-

[1] Utah R. Civ. P. 15(a) (emphasis added).
[2] Pett v. Autoliv ASP, Inc., 2005 UT 2, ¶ 6, 106 P.3d 705, 706-07 (internal quotations and citation omitted).

raised matter.[3] The Supreme Court has approved of allowing amendments to pleadings as little as four weeks before a scheduled trial.[4]

In this matter, the amendment comes more than seven months before the scheduled hearing on the merits set for late September 2007. The parties have not begun briefing any of the issues raised in the First Amended Request for Agency Action, and the administrative record for this matter has been available to the parties for little over a week. The request for leave to amend is therefore timely, and the DAQ and other parties will have ample time to respond to the newly-raised issue.

In addition to timeliness, Utah courts consider the justification for the delay and any prejudice to responding parties in deciding a motion for leave to amend.[5] In this matter, the administrative record was only made available to the parties last week, and the parties only obtained searchable electronic copies on February 15, 2007, and this motion is being filed the very next day. The administrative record was necessary to confirm the factual basis for the newly-raised issue, namely that there was no 18-month report provided to DAQ by the company as required in the AO, that the 18-month period had passed without commencement of construction, and that DAQ did not conduct a review of the AO after 18 months. The delay in amending the request for agency action is fully justified by the previous unavailability of the administrative record.[6]

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[3] Gillman v. Hansen, 26 Utah 2d 165, 486 P.2d 1045-46 (1971) (stating that the court should "allow amendments freely where justice requires, and especially is this true before trial"); Lewis v. Moultree, 627 P.2d 94, 98 (Utah 1981).
[4] Savage v. Utah Youth Village, 2004 UT 102, ¶¶ 9-10, 104 P.3d 1242, 1245-46.
[5] Savage, 2004 UT 102, ¶ 9.
[6] A party is fully justified in waiting to move to amend until reliable confirmation of the facts can be obtained. Kelly v. Hard Money Funding, Inc., 2004 UT App 44, ¶ 38, 87 P.3d 734. Furthermore, by moving to amend immediately after receiving the administrative record, Sierra Club is not acting out of "dilatory motive, bad faith, or

A motion for leave to amend a pleading should be granted unless there would be "undue or substantial" prejudice to the responding party.[7] The Utah Supreme Court has held that a motion to amend should be denied only where "the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare."[8] In this matter, because the proceedings have barely begun, there is no prejudice to the other parties – much less undue, substantial, or unavoidable prejudice.

Sierra Club respectfully submits that it is in the interest of justice to allow this amendment, and requests that the Board grant this motion. If the Board denies this motion, Sierra Club could file a separate request for agency action on this claim and move to consolidate proceedings on that separate request with this matter. Because the claim raised in Statement of Reasons # 22 in the Second Amended Request for Agency Action is based on the automatic expiration of the permit, and not to a particular action by the Division of Air Quality, there is no time limitation for Sierra Club to make such a filing. For the reasons stated above, and in the interest of administrative efficiency, we respectfully request that the Board grant Sierra Club leave to file its Second Amended Request for Agency Action in this matter.

Dated: February 16, 2007

___/s/_____
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unreasonable neglect" that would justify denying the motion for leave to amend. Swan Creek Village Homeowners v. Warne, 2006 UT 22, ¶ 24, 134 P.3d 1122, 1127.

[7] Swan Creek, 2006 UT 22, ¶ 21.

[8] Kasco Servs. Corp. v. Benson, 831 P.2d 86, 92 (Utah 1992) (internal quotations and citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February 2007, I caused a copy of the foregoing Memorandum in Support of Motion for Leave to Amend Request for Agency Action to be emailed to the following:

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